IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.126 OF 2006
WITH
CIVIL APPLICATION NO.155 OF 2006

Mr.Ralph D'souza & Ors. ..Appellants.

V/s.

Mr.Danny D'souza & Ors. ..Respondents.

Mr.Y.S.Jahagirdar for Atul Damle for appellants.

Mr.Clive D'souza for respondent Nos.1 to 10.

Ms.S.A.Musle i/b Cliford Martis for repondent No.12.

Mrs. Joglekar for BMC.

CORAM: A.M.KHANWILKAR,J

DATE : FEBRUARY 21, 2006.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Clive D'souza waives notice for respondent Nos.1 to 10. None appears for the respondent No.11. Ms.Musle waives notice for respondent No.12. The contesting respondents are respondent Nos. 1 to 10 who had filed the suit. The respondent No.11 has not appeared even before the lower court. In the circumstances, as contesting parties are before the

Court, by consent, appeal is taken up for final disposal, as short question is involved.

4. This appeal from order takes exception to the Judgment and Order passed by the City Civil Court, Bombay dated 27th October, 2005 in Notice of Motion No.1436 of 2004 in S.C.Suit No.1795 of 2004. In the said suit respondent Nos.1 to 10 took out Notice of Motion No.1436 of 2004 for temporary injunction. That Notice of Motion has been allowed in favour of the respondent Nos.1 to 10 and against the appellants herein. The basis on which interim relief was sought by the plaintiffs/respondent Nos. 1 to 10 is that they have purhcased flat in the building known as Alexander Heights situated on the Plot No.263, St.Anthony's Road, Chembur, Mumbai 400 071, some time back. They have now come to know that the appellants intend to construct another building abutting the Alexander Height in which the respondents/plaintiffs have purchased flats and have started occupying the said flats. It is their case that as they have already occupied their respective flats in Alexander Heights in 1992, the appellants cannot be permitted to construct new building abutting Alexander Heights in absence of approval given by the respondents/plaintiffs in that behalf. This is the

main reason, which weighed with the trial Court to answer the issue in favour of the respondents/-plaintiffs and against appellants/plaintiffs. The trial Judge has adverted to Section 7(1) of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 and decision of this court in the case of **Ravindra Mutenja vs.M/s.Bhavan Corporation reported in 2003(3) All M.R.521** to answer the issue against the appellants.

5. The argument of the appellants before this Court is that Section 7(1) has no application to the fact situation of the present case. This is so because rigours of section 7(1) will apply only in relation to the alteration in the structure of the building in which plaintiffs have purchased flats and are occupying the same, namely, Alexander Heights and not to the case on hand where the appellants intend to construct new building in accordance with the requirements of Municipal law after obtaining sanction from the appropriate authority in that behalf. For construction of such building, no prior permission of the flat purchasers of previously constructed building will be required as it is neither extension or alteration of Alexander Heights

as such. However, the respondents/plaintiffs would rely on the reported decision of this Court in **Ravindra Mutenja(Supra)** to contend that even with regard to the proposed construction of new building which is independent of the structure occupied by the flat owners, it is imperative to seek prior permission of the plaintiffs. This submission has been countered by the counsel for the appellants relying on the unreported decision of the Division Bench of our High Court in the case of **Mr.Sudhir Shetty & Anr. V/s. Mr.Dharma** V**. Desle dated 2nd December, 2003 in Appeal No.844 of 2003.** The Division Bench with reference to the purport of section 7A of the Act, 1963 has observed in paragraph-6 of this decision that no permission from flat purchaser was necessary when the building in which the flats of the purchasers are situated, no alteration, variation or change is being effected by the developer. In other words, the counsel for the appellants has pressed into service Section 7A to contend that on account of section 7A it was open to the appellants to construct additional building or structure on the plot, so as to develop as per the lay-out after obtaining the approval of local authority in accordance with the Building Rules or Building by-laws or Development Control Rule made

under any law, for the time being in force. Here it is relevant to note that the Division Bench has adverted to the reported decision of the learned Single Judge of this Court, which is pressed into service on behalf of the respondents/plaintiffs in the case of **Ravindra Mutneja(supra)** and has distinguished the same on the above principle. Even with regard to the fact situation of the present case, provision of section 7A will come into play; and in view of the dictum of the Division Bench as expounded in the unreported decision, there will be no inhibition for the appellants to construct additional structure or building in the same lay out on which Alexander Heights are already standing and occupied by the flat purchasers.

6. Viewed in this perspective, this appeal will have to succeed as this was the sole basis on which the court below has granted injunction against the appellants. Counsel for the respondents/plaintiffs however, contends that there is one more reason, which will have to be considered for sustaining the order of injunction passed by the lower court. According to him, objection has been noted by the Collector that additional structure cannot be erected. This contention has been carefully

considered by the trial Court and in my opinion, answered against the respondents/plaintiffs in paragraph-9 which reads thus:

> "9. Ld.Advocate, Mr.D'souza has submitted that 178.62 sq.mtrs. of the land which was exempted under the said order has to be kept open compulsorily. I have carefully gone through the said paragraph. I don't agree with Ld.Advocate Mr.D'souza that whole of the area admeasuring 178.62 mtrs. is to be kept open. What is to be kept open is an area which is required to be kept compulsorily open as per the F.S.I. and other regulations of the Municipal Corporation, T.P.Rules and other statutory regulations. Further rider is that "This part of the land shall not be used for any construction whatsoever and there is one more further rider that even if there is change in F.S.I. in future permitting additional construction this part shall not be available for such construction. The compulsory open area according to the existing F.S.I. and T.P.Rules was to be kept open only and was not allowed to be used for additional construction. Therefore, my interpretation of the said paragraph 7 is that whole area was not to be kept open. The part which was required to be kept open has been specifically defined in the said paragraph."

7. As no other argument is canvassed before this court and would arise for consideration, this appeal ought to succeed. However, even though the appellants may proceed to commence construction of additional structure in the neighbourhood of the Alexander Heights, that activity will be undertaken by the appellants strictly in accordance with the

sanctioned plan by the appropriate authority. No more and no less. Besides, such construction will be at the risk of the appellants and the appellants will not claim any equity, in the event, any directions were to be passed in the suit by answering the point in issue raised therein in favour of the plaintiffs. At that time the appellants will not be permitted to claim any equity of any kind, whatsoever. The appellants shall also abide by the directions of the trial Court to be passed hereafter with regard to the creation of third party rights in the structure, which is proposed to be erected in the neighbourhood of Alexander Heights. In addition, the appellants shall disclose to the prospective purchaser about pendency of the present proceedings and that rights created in their favour will be subject to the outcome of the present proceedings. On complying with such requirements, the appellants will be entitled to proceed with the construction activity, which will be subject to the outcome of the suit pending between parties before the trial Court. The appeal as well as civil application are disposed of on the above terms with no order as to costs.

8. At this stage Counsel for the respondent Nos.1 to 10 prays that the operation of the order

passed today may not be given effect for sometime to facilitate the respondents to take up the matter in appeal, if so advised. Request being reasonable one though opposed by the Counsel for the appellants, I am inclined to accede to that request. This order shall not be given effect for a period of six weeks from today.